No. 1075

In the Supreme Court of the United States

OCTOBER TERM, 1911.

ARTHUR JOHNSON, PETITIONER,

vs.

THE UNITED STATES.

On writ of certiorari to the court of appeals of the District of Columbia.

BRIEF FOR THE UNITED STATES.

SUBJECT INDEX, AUTHORITIES AND REFERENCES.

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STATEMENT OF THE CASE.

The petitioner, Arthur Johnson, was convicted of the crime of murder in the first degree in the Supreme Court of the District of Columbia, and sentenced to be hung for his offense. (R., 4, 5.) The judgment against him was affirmed by the Court of Appeals of the District (R., 15–24), and he thereupon applied to this court for a review of his case, on certiorari, an application concurred in by the Government and granted by the court.

Three questions are presented by the record, two purely and extremely technical, the other substantial and of the gravest consequence.

The substantial question is: May the jury in the District of Columbia, in a case of murder of the first degree, qualify their verdict of guilty by adding the words "without capital punishment?"

The technical questions relate to the arraignment of the defendant and to the empanelling of the jury.

THE ARGUMENT.

I.

The qualified verdict.

The Criminal Code of the United States now in force was approved March 4, 1909, and became effective January 1, 1910.

Section 330 of that code provides:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

The Supreme Court of the District held that this provision was not applicable to the District of Columbia, and denied to the prisoner the possibility of a verdict thus qualified. Manifestly, if this holding was wrong the judgment should be reversed.

The District Court held that the case was governed by the "Code of law for the District of Columbia," approved March 3, 1901, and made effective January 1, 1902.

This code provides, in section 801, that "the punishment of murder in the first degree shall be death by hanging," and makes no provision for a qualified verdict.

The Criminal Code is the later enactment of Congress, but it is a general code, dealing with the entire United States, except as its operation is restricted by its own terms.

The District Code was designed specially and only for the District of Columbia, but it is not a complete and comprehensive code of law, but is supplemented, as its first section provides, by the common law, certain British statutes, the principles of equity and admiralty, and "all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage" of the code and not inconsistent therewith or replaced by some provision of the code.

Section 1639 of the District Code, one of its repeal provisions, prescribes:

> The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to

> have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith.

Manifestly, the provision of the District Code must prevail over any inconsistent provision of any general law in force at the time of the passage of the code.

Prior to the passage of the code of 1901 the question under discussion was governed by general law, for the District Code theretofore existing did not deal with the subject.

Most of the penal laws enacted by Congress relate to offenses peculiarly against the Federal sovereignty, and not to matters of domestic police. These laws are operative alike in the States, Territories, and Districts, wherever the Government of the United States has jurisdiction.

There are other laws, however, enacted by Congress in virtue of the admiralty and maritime and territorial jurisdiction, and these are related to matters of domestic and local police. Here the jurisdiction of the United States is comprehensive; and there is no division of sovereignty with a State. Congress may establish a Territory in the formal sense and vest the power of domestic police in a territorial legislature, giving to the people of the Territory local self-government, or it may itself exercise that power, as it does in the District of Columbia and in Alaska, and places in the States and Territories within the exclusive jurisdiction of the United States. We will speak of this as the territorial jurisdiction of the

United States, for we have no occasion here to distinguish between that and the admiralty and maritime jurisdiction.

In the exercise of this territorial jurisdiction Congress enacted laws defining offenses and providing for their punishment, but did not attempt a comprehensive local penal code. These laws will be found in chapter three of Title LXX of the Revision of 1873, 2d edition. They relate to the offenses of murder, manslaughter, rape, maiming, and a number of others not necessary to be enumerated. To cover cases not specifically provided for it was enacted by section 5391 that—

> If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.

This chapter applied to the District of Columbia as being a "place or district of country under the exclusive jurisdiction of the United States." Sec. 5339.

This chapter, by section 5339, denounced the crime of murder, and provided that the person guilty

"shall suffer death." It did not define the offense, nor did it recognize any degrees of criminality. This was the law of the District of Columbia until the code of 1901 was enacted.

The same chapter, section 5345, denounced the crime of rape and visited it with the penalty of death. This was not the law of the District of Columbia, for section 1152 of the Revised Statutes of the District of Columbia, 1875 edition, punished rape, the first offense with imprisonment for from ten to thirty years, and the second offense with imprisonment for life.

The act of January 15, 1897, 29 Stat. 487, reduced the cases in which the penalty of death might be inflicted, limiting it to the crimes of treason, murder, and rape, and offenses under the Articles for the Government of the Army and the Navy.

This act also provided for the qualified verdict in cases of murder and rape, as follows:

> * * * That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

This act did not apply to the District of Columbia so far as concerned the crime of rape, for that crime in the District of Columbia was not capital and was

punishable by imprisonment for not less than ten nor more than thirty years. Compiled Statutes in force in the District of Columbia, 1894, page 160.

The act did apply to the District of Columbia so far as concerned the crime of murder, for that crime was punishable under section 5339 of the Revised Statutes. This was determined in *Winston* v. *United States*, 172 U. S. 303.

The general law of the United States was thus the law of the District of Columbia and continued to be until the enactment of the District Code of 1901.

That code defined the crime of murder, established degrees of the offense, and prescribed the punishment for each degree. The sections of the code in question are as follows:

> SEC. 798. MURDER IN FIRST DEGREE.—Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree.
>
> SEC. 799. Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree.
>
> SEC. 800. MURDER IN SECOND DEGREE.—Whoever with malice aforethought, except as

provided in the last two sections, kills another is guilty of murder in the second degree.

SEC. 801. PUNISHMENT.—The punishment of murder in the first degree shall be death by hanging. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years.

This code also changed the law as to rape, as follows:

SEC. 808. RAPE.—Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not less than five nor more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words, "with the death penalty," in which case the punishment shall be death by hanging: *Provided further*, That if the jury fail to agree as to the punishment, the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

A necessary result of enacting this code was that the provision as to the qualified verdict made by the act of January 15, 1897, ceased to apply to the District.

The provisions of the code were inconsistent with those of the general law, and the code was at once a later and a special act. Moreover, the act of 1897 is in terms limited to convictions of "the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five,

Revised Statutes," while convictions in the District were necessarily under the District Code.

There was no change of the law for eight years, and administration of it in the District was in accordance with the view we have expressed, and there never was challenge of its propriety. There were a number of trials for and convictions of murder in the first degree, and the death penalty was imposed in such cases.

The law of the District was thus, and apparently by deliberate design, made more severe than the general law.

It may be noted in passing, too, that a quite comprehensive code for Alaska was enacted March 3, 1899, and that this code established degrees of murder and provided for a qualified verdict in cases of murder of the first degree. Carter's Annotated Alaska Codes, page 2, sections 3 and 4.

Whatever the reason, the law of the District of Columbia was now exceptional in this respect.

Meanwhile a commission had been at work "to revise and codify the criminal and penal laws of the United States." It was provided for by the act approved June 4, 1897, 30 Stat. 11, 58, but did not make its final report until December 15, 1906. The first consequent action by Congress was the Criminal Code approved March 4, 1909, and now in force. This Commission framed the Alaskan Code but not that of the District of Columbia.

We have now to consider the general Criminal Code, and to determine its effect upon the code of the District.

The first ten chapters are applicable to the District of Columbia just as they are to the States, Territories, and other Districts. And the same is true of chapter twelve. These chapters deal with offenses Federal in their nature.

Chapter thirteen relates to territorial jurisdiction. It deals with certain offenses "when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States." The offenses dealt with are the circulation of obscene literature, polygamy, etc., bull fighting, prize fighting, and train robberies—subjects of domestic or local police.

The District Code dealt with these and similar offenses, except train robbery, viz: Section 870, bigamy; 871, seduction by teacher; 872, indecent publications; 873, seduction; 874, adultery; 875, incest; and 876, with prize fighting and bull fighting.

The corresponding sections of the District and Criminal Codes are by no means identical; there being sometimes differences in the description of the offense and always in the punishment prescribed.

Chapter thirteen of the Criminal Code applies to the District of Columbia, and where inconsistent therewith supersedes the District Code.

There seems to be no room for doubt of this. The offenses defined are to be punished as prescribed

"when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States." Sec. 311. The District of Columbia comes within this description. Then we find in section 319 that "the provisions of this section shall apply only within the Territories of the United States," and in section 320 that "the provisions of this section shall apply only within the Territories of the United States and the District of Columbia."

And this was intended by the commission. In their final report, made in 1906, and published in that year, they present in volume 2, pages 1840 to 1842, a chapter thirteen. This contains provisions as to intimidating voters, conspiring to deprive any person of the equal protection of the laws, and gambling, not contained in the chapter as adopted. As to the offenses which are contained in the code as adopted, the sections, with slight and absolutely immaterial verbal differences, are the same in both. Section 9026 of the report, page 1842, provides:

> The offenses defined in this chapter shall be punished as herein provided when committed within Alaska, Arizona, Hawaii, New Mexico, Porto Rico, and the District of Columbia, notwithstanding the word "Territory" alone is used in several sections of this chapter.

The difference between the law as reported and as enacted is that the law enacted in its description of jurisdiction is not so detailed but is more comprensive.

Chapter thirteen of the Criminal Code is then applicable to the District of Columbia, and it can not be said broadly that in the enactment of the Criminal Code there was no purpose to deal with or modify the District Code in any respect.

We think it equally clear that chapter eleven of the Criminal Code was not intended to apply to the District of Columbia.

In their report of 1906 the commission say, vol. 1, page 110:

> "In the revision of this chapter we have deemed it important to define with the greatest attainable precision the places within which the jurisdiction of the United States over crimes shall be exercised."

The definition adopted will be found in volume 2, page 1829, and is as follows:

> SEC. 8929. The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> *First.* When committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on—
>
> (*a*) The high seas, the seas bordering on the United States within a distance of one marine league from the shore, or on any river, haven, creek, basin, or bay immediately connected with such seas;
>
> (*b*) Lake Michigan and the Straits of Mackinaw; and the waters of Lake Superior, Saint Mary's River, Lake Huron, River Saint Clair, Detroit River, Lake Erie, Niagara River,

Lake Ontario, River Saint Lawrence, and the Rio Grande Del Norte River, to the middle of such waters;

(*c*) Any vessel owned in whole or in part by the United States or any citizen thereof, or any corporation created under the laws of any of the States thereof; or—

Second. When committed within or on—

(*a*) Any fort, arsenal, dockyard, magazine, other needful building, structure, reservation, or other place under the exclusive jurisdiction of the United States; or

(*b*) On any island, rock, or key containing deposits of guano which may, at the discretion of the President, be considered as appertaining to the United States.

The words "or other place under the exclusive jurisdiction of the United States" might be construed broadly enough to include a district or Territory, but this was not the intention. What the commission did intend is shown by its report, pages 97 and 98:

> "To gain a clear understanding of what is needed in a Federal code of crimes and punishments, it is fundamentally important to take into account what may be called the territorial jurisdiction of the United States. Paragraph 17 of section 8, Article I of the Constitution, gives Congress power 'to exercise like authority (that is, "exclusive legislation in all cases whatsoever") over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of

forts, magazines, arsenals, dockyards, and other needful buildings.'

"It was decided by Mr. Justice Story in United States v. Cornell (2 Mason, 60), that 'exclusive jurisdiction is attendant upon exclusive legislation.' The condition that this involves is that a crime committed within any area acquired under the above provision must be punished by the United States or it cannot be punished at all. It is now well established that there are no common-law crimes against the United States, and it follows that every offense must be defined and the penalty prescribed by law.

"The Constitution specifies forts, magazines, arsenals, and dockyards, and then adds 'other needful buildings.' Among the latter are the post-offices, custom-houses, and court-houses, that the Government has erected in all the larger cities of the Union. * * * It follows that the United States is chargeable with the prosecution and the punishment as well of the slightest misdemeanor as of the gravest felony there committed.

"*But the method prescribed by the paragraph of the Constitution above quoted is not the only one by which the United States may acquire territorial jurisdiction. It may become possessed of land for other purposes than those there specified, or it may retain jurisdiction over tracts of the public domain for military reservations or other uses.*"

The intention was simply to include the places acquired in the manner described in the last paragraph of the quotation.

This is made plainer by the report of the commission, as amended by the joint committee of Congress and published in 1908. The third paragraph of section 8900 of this report provides:

> Third. *When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building.*

In this form it was reported to Congress and was enacted into law. Paragraph third of section 272 of the Criminal Code. It took the place of section 5339 of the Revision of 1873, the language of which was "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States."

The new law obviously restricted this territorial jurisdiction, and there was a reason for so doing.

Chapter eleven deals with offenses of the kind subject to the jurisdiction of the States severally, where there are States—offenses not distinctively Federal in character, but subjects of local or domestic police.

The Territories provided their own laws for such cases, just as the States did, and Congress had by distinct enactments made provision alike for the District of Alaska and for the District of Columbia; and it was not disturbing these special provisions.

That Congress intended only to deal with matters of local police in this restricted territorial jurisdiction is made manifest by section 289:

> Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing, or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.

This was plainly designed to apply the law of a State, Territory, or District to places to which it would not otherwise attach. True, this was not necessary as to a District like that of Columbia or Alaska, over which Congress had plenary and exclusive jurisdiction, but it was as to States and Territories, and might become so as to Districts under conditions arising hereafter.

Counsel for petitioner cite a case in the Supreme Court of the District in which Judge Anderson

reached a different conclusion, but how? By changing the law. As enacted by Congress the law reads:

> When committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof.

The judge repeats the words "any lands," as we will indicate by italics, and so makes the section read:

> When committed within or on any lands reserved or acquired for the exclusive use of the United States, and *any lands* under the exclusive jurisdiction thereof.

This interpolation gives to the last clause of the sentence an extensive instead of a restrictive effect, but there is absolutely no warrant for the interpolation.

We conclude that chapter eleven did not repeal sections 798 to 801 of the District Code defining the crime of murder and prescribing the punishment therefor, but left them unimpaired as the law of the District.

This leaves chapter fourteen, the one containing the provision for a qualified verdict. It is entitled "General and special provisions." The special provisions are sections 328 and 329, which relate to offenses by Indians or on Indian reservations, and are of no significance in this discussion.

Sections 323 to 327 are precise copies of sections 5325 to 5328 and 5330 of the Revision of 1873. These sections of the Criminal Code are the law of the

District of Columbia and the corresponding sections of the Revision were so long before the District Code was adopted, and the District Code contains nothing inconsistent with any of them. Indeed, the law would be as it is if these sections were all repealed, as was the old provision, 5329 of the Revision, resepcting benefit of clergy. These provisions are merely declaratory, or they prohibit something which, if it can be done at all, can be done only under the sanction of an affirmative statute. There is nothing in it all indicating a purpose to amend the Code of the District.

Sections 331 and 334 had their counterparts, almost exact, in sections 5340 and 5324 of the Revision. They relate, the one to a disposition of the bodies of criminals who have been executed and the other to accessories to piracy. Neither subject is dealt with by the Code of the District of Columbia, and these sections are law in the District, made so by the Revision of 1873 and of course not restricted in their scope because of a purely formal amendment.

Section 332 makes principals of accessories before the fact. They were already so under the Code of the District. Section 333 prescribes a measure or standard of punishment for accessories after the fact. This had been done by the District Code. The commission in these sections were amending not the District Code but the Revised Statutes. They say in their report of 1906, pages 118–119:

> "In accordance with the policy of recent legislation those whose relations to a crime

would be that of accessories before the fact according to the common law are made principals. Accessories after the fact are made subject to one-half of the term of imprisonment or fine imposed upon principals, or where the principal is punishable by death, then the penalty for an accessory is fixed at imprisonment for not more than ten years. Chapter 8 of Title LXX, Revised Statutes, makes accessories after the fact to murder, robbery, or piracy punishable by imprisonment for not more than three years; to robbery of a mail carrier by imprisonment not more than ten years, and to stealing from the mails by imprisonment not more than five years. There is a manifest inconsistency in these penalties which we have here sought to reform. By the common law there are no accessories after the fact to misdemeanors. Congress has in numerous instances expressly declared certain offenses to be misdemeanors to which it has nevertheless attached the penalty of imprisment for long terms of years. It would seem just that those who harbor or aid in the escape of such offenders should not enjoy immunity, and a provision is reported for the punishment of accessories after the fact to all offenses."

And the joint committee of the House and Senate in their report to their respective Houses set out the existing law and the law as they propose to make it, section by section, on opposing pages, and turning to pages 356 and 357 we find on page 356 the sections of the proposed law, there numbered

329 and 330, and on page 358, sections 5323, 5427, 5533, 5534, and 5535 of the Revision as the existing law which is to be changed. Senate Reports (Public), vol. 3, 60th Congress, 1st session, 1907–08. Section 333 deals with venue in cases of murder and manslaughter and is an amendment of sections 5339 and 5341 of the revision.

There are new sections in the chapter, those from 337 to the close, relating to the construction of the chapter, but no rule is laid down which is of any significance here, unless it be that of section 339, declaring that the arrangement and classification of the title has been for purposes of order and convenience, and that a legislative construction is not to be inferred therefrom.

The remaining sections of the chapter are two, section 330, which provides for the qualified verdict, and 335, which provides:

> All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.

This is an entirely new section. It does not amend any section of the Revision or any section of the District Code. From its very nature it is a general provision of Federal jurisprudence. Applicable to the District of Columbia it must be, for the great body of the general Federal Criminal Code is applicable here, and the provision defining felonies and misdemeanors is not one susceptible of being split in the District as between those offenses which are Federal

in their nature and those which are Federal only because of the territorial jurisdiction.

Section 330, authorizing the qualified verdict, stands upon a different footing. It deals with the measurement of punishment that may or must be meted out for an offense. This is not necessarily the same throughout the jurisdiction of the United States. In fact, until the Criminal Code took effect, and for some years prior to that time, we had one rule for the District of Columbia, another for the District of Alaska, and another for the remainder of the United States. In the United States at large the act of 1897 provided for the qualified verdict in any case of murder and permitted the death penalty in any case. In the District of Columbia two degrees of murder were recognized, the first punished inexorably with death and the second entirely exempted from that penalty. In Alaska there were two degrees of the crime, the second being exempt from punishment by death and a qualified verdict being authorized for the first degree.

Which of these laws was section 330 designed to amend? The joint committee of the House and Senate report it as an amendment of the act of 1897. (Pages 356 and 357 of the report.)

And verbally the new section is not adapted to amend the provisions of the Code of the District. The amendment assumes that the penalty affixed by law to murder in the first degree and to rape is death. So it was under the Revision, but not in the District of Columbia. In the District the punishment for rape was a long term of imprisonment, but it was pro-

vided by section 808 that the jury might inflict the death penalty. Unless they did, the punishment would be imprisonment. No authority to remit the death penalty was necessary here.

In so far as the Criminal Code deals distinctively with the territorial jurisdiction of the United States, and this matter comes under that head, its application to the District of Columbia is made clear whereever that is intended. This is in chapter thirteen, and only therein.

When the Criminal Code, in chapter fourteen, refers under its "general provisions" to the crimes of murder and rape, it must, unless there is some express statement otherwise, have reference to them as otherwhere dealt with in the same code. These crimes are dealt with only in chapter eleven, and in virtue of the territorial or admiralty jurisdiction of the United States. We have undertaken to show that the territory to which the chapter applies does not include any organized territory or district, or any place, indeed, which may provide its own code of domestic police, or for which a distinctive code may be provided by Congress.

The repealing chapter of the Criminal Code gives support to our view. It is very elaborate, covering seven large printed pages. It specifically repeals hundreds of sections of the Revised Statutes, and sixty different acts or parts of acts. It does not ignore the District of Columbia, for on page 74 it repeals "'An act to prohibit prize fighting and pugilism and fights between men and animals, and to provide

penalties therefor in the Territories and the District of Columbia,' approved February twenty-seventh, eighteen hundred and ninety-six." In none of the repealing sections, however, is there any reference to the Code of the District or to any section of it.

Nothing is to be inferred from the fact that as a result of our construction the Code of the District differs as to the same offenses from the general law. Such differences resulted from the very enactment of the District Code. It made its own definitions of offenses and prescribed its own punishments, and, as we have seen, on the subject under consideration differed at once from the Alaskan Code, adopted in 1899, and from the general law of the United States.

The Commission to Revise and Codify the Criminal and Penal Laws of the United States was appointed under the act of June 4, 1897, and they conceived their duty to be related to the general laws and not to those of any particular Territory or district. They state in their report of 1906, page 1, that—

> * * * The duties of the Commission were from time to time increased and extended until its labors comprehended a complete revision of all the permanent and general laws of the United States. *Almost at the threshold of its work on the criminal and penal laws the Commission was required by a resolution of Congress (Cong. Rec., Vol. 31, p. 5368), to prepare a code of civil and penal laws for the District of Alaska*, which was completed, reported,

and enacted by Congress during the years 1899 and 1900 (30 Stat., 1253; 31 Stat., 321).

On the 3d of March, 1899, Congress further extended the duties of the Commission by providing that the Commission should—

"Revise and codify the laws concerning the jurisdiction and practice of the courts of the United States, including the judiciary act, the acts in amendment thereof and supplementary thereto, and all acts providing for the removal, appeal, and transfer of causes (30 Stat. L., 1116)."

On the 3d of March, 1901 (31 Stat. L., 1181), Congress further extended the duties of the commission by directing it "to revise and codify," in accordance with the terms and provisions of the act authorizing its creation—

"All laws of the United States of a permanent and general nature in force at the time the same shall be reported. That in performing this duty the said commission shall bring together all statutes and parts of statutes relating to the same subjects, shall omit redundant and obsolete enactments, and shall make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text; and may propose and embody in such revision changes in the substance of existing law; but all such changes shall be clearly set forth in an accompanying report, which shall briefly explain the reasons for the same. That the said commission shall arrange such revision under titles, chapters, and sections, or other suitable divisions and sub-

> divisions, with head notes briefly expressive of the matter contained in such division, and with marginal notes so drawn as to point to the contents of the text, and with references to the original text from which each section is compiled, and to the decisions of the courts of the United States explaining or construing the same; and shall provide by an index for any easy reference to every portion of such revision. That when the commission have completed such revision in accordance herewith, it shall cause a copy of the same, in print, to be submitted to Congress, that the statutes so revised and codified may be reenacted if Congress shall so determine.

The Code of Alaska was undertaken by the special requirement of Congress, but neither in any act of Congress creating or instructing the commission, nor in any statement of the commission as to the scope of the work is there any allusion to any code of the District of Columbia. Throughout the various reports of the commission which we have been able to find there is no word suggesting either revision of the District Code or repealing it and applying the general code to the District.

To the contrary, the commission, page 2 of the report of 1906, say:

> On the 15th of May, 1901, the Commission completed its revision of the criminal and penal laws and reported the same to the Attorney General, which was by him transmitted to Congress and in due course referred to the appropriate committees in the Senate and in

the House. A bill embodying the provisions of the report was introduced in the House, and upon reference was considered by the Committee on the Revision of the Laws during the session of the Fifty-eighth Congress, but no final action was taken thereon.

The District Code had a source of its own. It was the work of lawyers of the District who had in mind its peculiar needs, and Congress took it from their hands and enacted it into law for the government of the District. It has been recognized as the District Code ever since, and from time to time at different sessions of Congress has been amended as such code.

When the commission to revise the general penal code made its report on May 15, 1901, the District Code had just been enacted, March 3, 1901, to take effect January 1, 1902. If the commission intended to repeal this code between the time of its enactment and the time of its taking effect, and to do this by the penal code submitted by them as a part of their report of May 15, 1901, they would have said so in that report, and said so plainly. But there is not a word of such purport to be found in their report, and the only allusion to the District is an implied statement at least that they are not proposing to disturb it. On page xxx of this report of 1901 we have:

CERTAIN OFFENSES IN THE TERRITORIES.

Sections 429, 430, "Intimidating, etc., voters," and "Conspiracy to deprive any person of the equal protection of the laws."

Sections 5507 and 5519, Revised Statutes, have been held to be unconstitutional as to the States, but the grounds upon which that conclusion is based do not extend to the Territories, which are subject to the direct legislation of Congress. These sections, with the proper limitations, are accordingly inserted in this chapter.

Section 431, "Polygamy:" This section is also inserted in the chapter, "Offenses within the territorial and maritime jurisdiction of the United States;" hence the words "or other place over which the United States have exclusive jurisdiction," are here omitted. The section is also embraced in "An act to establish a code of law for the District of Columbia," approved March 3, 1901.

Section 432, "Unlawful cohabitation:" The notes on the previous section are here applicable.

Section 440, "Prize fights, bull fights, etc.:" The words "or the District of Columbia" are omitted as this and the following section are embraced in the act to establish a code of law for the District of Columbia already mentioned.

This is everything relating specifically to the District or District Code. The report of the commission was not acted upon for some years, and the penal code presented by them was amended in some particulars before it was adopted, but it was not essentially changed in any respect, and not at all so far as would affect its relation to the Code of the District.

The history of the legislation shows that there was no purpose of securing uniformity throughout the territorial jurisdiction of the United States in the matter of local or domestic police. The Territories were empowered to make their own laws respecting such matters, and Congress enacted a distinct code for Alaska, another for the District of Columbia, and still another for the waters, lands, and places so carefully defined in chapter eleven of the general Criminal Code. Systems or codes of laws thus varied and varying we have had ever since the Alaskan Code was enacted. The amendment of one of them has not hitherto been taken as an amendment of the others. Well-settled principles of statutory construction preclude that an amendment of the general code be taken as an amendment of any of the special codes unless such a purpose is plainly expressed.

Murder in the first degree is defined by sections 798 and 799 of the District Code and by section 273 of the general code. The definitions are not the same. One marked difference is that killing, in the perpetration of or attempt to perpetrate any penitentiary offense, is by the District Code murder in the first degree. By the general code, killing is murder in the first degree when done in the perpetration of or attempt to perpetrate any arson, rape, burglary, or robbery. The District Code is more severe in its definition and so it is in its provision for punishment. A change in the definition of the District Code can not possibly be inferred from the change of definition in

the general code. If the provision for a qualified verdict in the general code were to be found in the eleventh chapter, there would be as little warrant for the inference that the District Code was changed in that respect. The case as to definition differs from that as to punishment only in that the provision as to the qualified verdict is to be found in the fourteenth chapter, relating to "general and special provisions," and we are told by this very chapter, in section 339, that "the arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, *and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed.*"

We see no escape from the conclusion that Congress in adopting the general penal code did not intend to, and did not in fact, apply it to the District of Columbia, saving and excepting only chapter thirteen, which was made expressly applicable.

II.

The arraignment.

The record of the trial court as to the arraignment is in proper form. The recital is as follows (p. 2):

Arraignment.

Supreme Court of the District of Columbia.

FRIDAY, MARCH 10TH, A. D. 1911.

The Court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

> Come as well the attorney of the United States as the defendant, in proper person, in custody of the warden of the United States jail in and for the District of Columbia, and by his attorney T. M. Baker, Esquire; and, thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country and the attorney of the United States doth the like.

It is sought to impeach this by affidavit of prisoner's counsel, which is simply to the effect that at his arraignment the prisoner waived the reading of the indictment. He was attended by counsel at the time, and it is not made to appear in any way that he was not fully advised of the nature and cause of the accusation, or that his plea of "not guilty" was not intelligently made.

The affidavit of counsel does not preclude the fact that the prisoner had a copy of the indictment and that its purport was fully and clearly stated to him at the time, which would serve every purpose of the law much better than a formal reading. The affidavit states that certain things were done, basing this statement upon the observation of counsel, and then proceeds to say that "*there is no record* of anything other or further being done as to arraignment of of defendant" (R. 5). In other words, the record is appealed to as conclusive that nothing was done in so far as it is silent, and inconclusive, and subject to impeachment by affidavit in so far as it spe affirmatively.

This will not do. If the record is to be impeached by affidavit, then all the facts must be shown. The case of *Crain* v. *United States*, 162 U. S. 625, does not go to the extent of holding that the mere reading of the indictment may not be waived in any case when the accused is otherwise informed of the charge against him and pleads thereto intelligently. Neither does any other case cited by counsel. It is held in *Crain's* case, page 637, that "in capital or other infamous crimes an arraignment has always been regarded as a matter of substance." But this is not to say that there is no arraignment simply because there is no formal reading of the indictment. Indeed, the court in *Crain's* case, page 637, said: "According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, *and informed of the charge against him*, is, the 'demanding of him whether he be guilty or not guilty,'" etc. And the requirement of the Constitution is not that the indictment be formally read, but that the accused "be informed of the nature and cause of the accusation." *Crain's* case is an extreme one, and was dissented from by three judges as proceeding "upon the merest technicality"; but even that case does not hold that an arraignment meeting every requirement of the law is insufficient if so be it the indictment is not formally read at the time of taking the plea, and, on the contrary, the court, page 643, quotes Bishop, with approval, to the effect that "with the consent of the court the prisoner may waive the reading of the indictment, though without waiver it

will be read, even where he has been furnished with a copy." 1 Bishop's Crim. Proc., sec. 733.

The recital of the record, however, is to be taken as conclusive, sustained as it is by the action of the trial court in accepting it as against the affidavit of counsel.

In *Evans* v. *Stettnisch*, 149 U. S. 605, l. c. 607, it was said:

> * * * The record imports absolute verity; the affidavit of a witness does not; and when the court, which, in addition, may be supposed to have personal knowledge of the fact, sustains the recital in the record as against the statement in the affidavit, its ruling cannot on review be adjudged erroneous.

III.

Empanelling the jury.

Objection is made in this court to the manner of obtaining jurymen after the regular panel had been exhausted by challenges and excuses.

It is not suggested that any incompetent person was placed upon the jury list.

No objection was made by the defendant at the time to the way in which the list was filled. The persons called were examined upon their *voir dire*, and the only objection of any kind made in the course of the examination had reference to the matter of the qualified verdict.

There was no allusion to this in the motion for new trial and in arrest of judgment.

It was not assigned as error in the Court of Appeals of the District on the hearing of the case in that tribunal.

The objection is made here for the first time.

The particular manner in which a deficiency in the regular jury panel is supplied, when every man called is a competent juror, and the resulting jury which tries the case is an impartial jury of the district wherein the crime was committed, involves nothing in the nature of a constitutional right and nothing which, if irregular in any manner, may not be validated by the consent of the accused.

The contention, as we understand it, moreover, is not that any provision of law with regard to the empanelling of the jury was violated, but that "through oversight on the part of the compilers of the District Code a provision for completion of juries in capital cases corresponding to section 857, Revised Statutes for the District of Columbia, was not included"; and so, as stated by counsel, "as to completion of a jury to try a capital case, there is an entire absence of statutory authority for impanelling." This being so, there could be no trial at all. The regular panel drawn for service at any term of the court is, under section 204 of the District Code, to consist of twenty-six persons, and as under section 918 the defendant has twenty peremptory challenges, he could forever prevent a trial. But the court has inherent power to meet a contingency like this and is not dependent upon an express statute for authority to supply deficiencies in the panel created by challenges or excuses.

The court here pursued a method that was usual, and which drew for the panel only such persons as had been previously put upon the general jury list of the District in the manner and by the officials appointed by the Code of the District, section 198. This, without the approval of the defendant, was right, and, done with his approval, cannot be the subject of complaint.

If, however, the men thus called to fill the panel were not competent to serve, then they were subject to challenge for cause, and the cause of course was known to defendant at the time. Section 919 of the District Code provides:

> No verdict shall be set aside for any cause which might be alleged as ground for challenge of a juror before the jury are sworn, except when the objection to the juror is that he had a bias against the defendant such as would have disqualified him, and such disqualification was not known to or suspected by the defendant or his counsel before the juror was sworn.

Any right the defendant could possibly have as to the manner of filling the panel is statutory and not constitutional, and the statute could properly provide, and here has done so, the time when that right must be asserted or held to be waived.

The objection to the jury is utterly wanting alike in merit and in timeliness.

It is respectfully submitted that the judgment herein should be affirmed.

F. W. LEHMANN,
Solicitor General.

APRIL, 1912.

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